Petition

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ALEXANDER L. STEVAS,
CLERK

81-377

No._____

IN THE SUPREME COURT OF THE UNITED STATES

Term 198__

JERRY GEORGE MYHRVOLD,

Petitioner,

vs.

GEORGE E. SULLIVAN, Superintendent,
Oregon State Correctional Institution,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Was there a conflict of interest which denied the petitioner's Sixth Amendment right to assistance of counsel where the joint trial and joint representation of the petitioner and two co-defendants effectively precluded defense counsel's impeachment of a co-defendant whose testimony was harmful, unforeseen and inconsistent with the petitioner's testimony?

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The petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 19, 1981.

OPINIONS BELOW

The unreported Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, Slip Opinion no. 80-3445, decided May 19, 1981, is set out as Appendix A. The Order and Findings of the United States District Court for the District of Oregon adopting the findings and recommendations of the United States Magistrate is set out as Appendix B and C. The unreported denial of a Petition for Review by the Oregon Supreme Court is set out as Appendix D. The opinion of the Oregon Court of Appeals, officially reported at 40 Or App 349, 595 P2d 494 (1979), is set out as Appendix E. The Amended Order Granting Post-

Conviction Relief by the Circuit Court of Oregon for the County of Marion is set out as Appendix F. Petitioner's Order of Sentence is set out as Appendix H and the Oregon Court of Appeals opinion affirming the conviction is officially reported at 31 Or App 113, 569 P2d 59 (1977) and set out as Appendix G.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 19, 1981. This Petition for Certiorari was filed within ninety days of the final order of the Court of Appeals for the Ninth Circuit. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Was there a conflict of interest which denied the petitioner's Sixth Amendment right to assistance of counsel where the joint trial

and joint representation of the petitioner and two co-defendants effectively precluded defense counsel's impeachment of a co-defendant whose testimony was harmful, unforeseen and inconsistent with the petitioner's testimony?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Six.

In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution,

Amendment Fourteen

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254(a):

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in

violation of the Constitution or laws or treaties of the United States.

STATEMENT

Procedural History

On December 8, 1976, petitioner was convicted by jury in the Circuit Court for the State of Oregon, County of Linn, of rape in the first degree. The Court sentenced petitioner to a period of four (4) years incarceration (App. H). The Oregon Court of Appeals affirmed petitioner's conviction at State v. Myhrvold, 31 Or App 113, 569 P2d 59 (1977) (App. G).

Petitioner subsequently sought post-conviction relief on the ground that his trial attorney's joint representation of three co-defendants, suffered from a conflict of interest and, thereby, denied petitioner effective representation of counsel. The Circuit Court of Oregon for the County of

Marion granted petitioner post-conviction relief after an evidentiary hearing and ordered a new trial (App. F). The State appealed, and the Oregon Court of Appeals reversed the Marion County Circuit Court and reinstated the judgment on the basis that petitioner's defense was not significantly affected by a co-defendant's contradictory testimony which was unchallenged by their joint defense counsel (App. E). See Myhrvold v. Sullivan, 40 Or App 349, 595 P2d 494 (1979). The Oregon Supreme Court denied a Petition for Review of that decision on July 24, 1979 (App. D).

Petitioner then sought a writ of habeas corpus pursuant to 28 USC § 2254 again arguing that he had been denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. Respondent denied that petitioner had stated a claim of relief and moved for dismissal.

The petition was first considered by the Honorable Michael R. Hogan, United States Magistrate, who filed his findings and recommendations ordering that the petition be dismissed and judgment entered accordingly, on August 13, 1980 (App. C). Thereafter, on September 3, 1980, the Honorable Robert C. Belloni, United States District Judge, adopted the magistrate's finding and recommendations, and directed that the Clerk of the Court enter judgment (App. B). On September 4, 1980, judgment was entered and petitioner's action was dismissed.

Petitioner then appealed the District Court's judgment to the United States Court of Appeals for the Ninth Circuit. On May 19, 1981, the Court of Appeals affirmed the District Court's position, holding that "the choice of defense was not tainted by any conflict of interest" and petitioner was not prejudiced (App. A at 3). (emphasis added).

Petitioner is presently on parole from the Oregon State Corrections Division.

Factual History

Petitioner, and two other young men, Robert Morton and Rick Bethell, were charged in the Linn County Circuit Court for the State of Oregon, with rape in the first degree arising out of the same incident (Post-conviction hearing transcript [HR TR 4-6]). Petitioner and Morton initially contacted the law office of C.S. Emmons regarding representation (HR TR 6,7). Although wishing to retain Emmons, petitioner and Morton never spoke to Emmons until the day of trial (HR TR 22). Instead, they interviewed with an office associate, Rick McCormick (HR TR 13,15). McCormick advised petitioner that Bethell had already come into the office, but if there was no conflict, petitioner and Morton would also be represented (HR TR 7). Petitioner, Morton and Bethell later gave McCormick a description

of the incident.

To petitioner's knowledge, McCormick was advised that petitioner, Morton and Bethell were riding around in Bethell's pickup. They stopped at a restaurant, and met Lisa Mariani who accepted a ride home. On the way to Mariani's house, Bethell turned off on a dirt road and parked (HR TR 36). Mariani and Bethell started kissing, and when Bethell began taking Mariani's pants down, petitioner and Morton got out of the cab and went to the back of the pickup (HR TR 36). After five minutes, Bethell came to the back of the pickup and told petitioner Mariani "wanted him". Petitioner went to the driver's door and looked in (HR TR 37). Petitioner did not get into the truck, and no one ever told McCormick that petitioner climbed into the truck or attempted sodomy with the victim (HR TR 37).

After three meetings with McCormick, petitioner and Morton went to see another

attorney, Mr. Ringo (HR TR 21). Since Ringo wanted $1,000.00, petitioner did not pursue the idea (HR TR 22).

Emmons represented all three defendants in a joint trial.

At trial, the court never inquired of the co-defendants' satisfaction with the joint representation arrangement or whether any conflict might exist, nor was petitioner advised of his right to separate counsel (TR 1,2). Subsequently, each of the defendants testified, with Bethell leading off. On cross-examination, Bethell, after indicating his initial contact with the victim was consensual but that he was too inebriated to have intercourse, "estimated" that petitioner may have had some lewd sexual contact with the victim although he did not see it (TR 138-141). Even though this testimony was contrary to all three co-defendants' previous statements to their joint counsel, the defense attorney failed to attack this inconsistency

on petitioner's behalf.

Thereafter, consistent with the previous statements, petitioner testified that he had no sexual contact with the victim at all. On cross-examination, he was confronted with, and denied, Bethell's version of the encounter (Tr 154,155). Again, defense counsel failed to assist petitioner and concluded the testimony without redirect examination (Tr 155).

Simply put, Bethell, as an eyewitness, invited the jury to find that petitioner had engaged in a lewd sex act with the victim while petitioner unequivocally denied having any such contact. In the middle of this inconsistency, defense counsel did nothing, apparently reasoning at that point that the impeachment of one co-defendant to aid another would have likely cast more blame upon the first. But the failure to address this inconsistency, which is the basis for this petition, became as much a conflict of interest as if defense counsel had favored one

co-defendant's testimony over another's.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Ninth Circuit inaccurately applied the test for determining an actual conflict of interest in this case of multiple representation of three co-defendants in a joint trial by a single defense attorney.

In denying the instant habeas petition, the Court of Appeals for the Ninth Circuit held that there was no violation of petitioner's Sixth Amendment right to effective assistance of counsel at trial because the defense strategy was not "rooted in a conflict of interest."[1] The Court of Appeals took the position that a conflict of interest must be significant and must be shown

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1. Memorandum Opinion, App A at 2.

in pretrial circumstances for a defendant to raise the issue of effective assistance of counsel at a later point in the litigation.[2]

While this Court has addressed the issues of whether required joint representation is unconstitutional, Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 (1978); Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942), and whether the trial court should inquire into possible conflicts of interest or whether a defendant must show an actual conflict of interest, Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980), this Court has never held that an actual conflict of interest, previously unforeseen, cannot arise during the course of a trial. Petitioner submits that such an unforeseen conflict did occur in his trial and that the inability of the defense attorney to recognize or deal with

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2. Id., at 2-3.

the conflict denied petitioner effective assistance of counsel.[3]

Where an actual conflict of interest arises in the representation of co-defendants by the same attorney and, as a result, one co-

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3. Post-conviction Hearing Transcript -- Cross-examination of C.S. Emmons, defense attorney at trial:

"Q. Well was that a change in the testimony or was that the same that you had been hearing?

"A. I'm not at all sure that anybody questioned them that closely."

(HR TR 70)

* * *

"Q. Now do you notice on that page that Mr. Myhrvold testified he's up there one minute?

"A. Yes.

"Q. Now isn't that a pretty great conflict when we're dealing with rape, one minute as opposed to five minutes?

"A. It could be."

(HR TR 71)

defendant suffers an actual lapse of representation, his conviction must be reversed whether or not prejudice is shown. Cuyler v. Sullivan, 446 U.S. at 349, 100 S.Ct. at 1719; Holloway v. Arkansas, 435 U.S. at 487-491, 98 S.Ct. at 1180-1182.

Here, the inconsistent testimony at issue was analyzed by both the Oregon Court of Appeals and the United States Court of Appeals for the Ninth Circuit in terms of prejudice. The appellate courts found that the testimony had not "significantly" affected petitioner's defense.[4] Petitioner maintains that those decisions put the cart before the horse. Since defense counsel was unable to effectively examine a harmful witness because the witness was also a client, an actual conflict of interest arose at that point. Because that conflict was not cured at trial,

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4. App. A at 3; App. E at 7,9.

the analysis should have ended there, and petitioner's writ of habeas corpus should have been granted. The appellate courts, however, in direct contravention of this Court's mandate, went on "'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict" due to the choice of defense strategy.[5] Cuyler v. Sullivan, 446 U.S. at 349, 100 S.Ct. at 1719, citing Glasser, supra, 315 U.S. at 76, 62 S.Ct. at 467. See also, Holloway v. Arkansas, 435 U.S. at 487-491, 98 S.Ct. 1180-1182.

Petitioner submits that the Court of Appeals erred in speculating as to the amount of prejudice incurred or the materiality of separate representation.[6] Assistance of Counsel is among those "constitutional rights so basic to a fair trial that their infraction

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5. App. A at 2-3; App. E at 8, 9, 11 n. 7.

6. App. A at 3.

can never be treated as harmless error." Holloway, supra, 435 U.S. at 489, 98 S.Ct. 1181, citing Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827 (1967). The right to effective assistance of counsel, in order to be meaningful, must include the right to separate counsel whenever an individual's defense becomes fettered by the constraints of joint representation, including unforeseen midtrial conflicts.

Finally, while this Court has recognized the inherent obligation of defense attorneys to alert the trial court whenever they discover a conflict of interest, Cuyler v. Sullivan, 446 U.S. at 346-347, 100 S.Ct. at 1717, Holloway v. Arkansas, 435 U.S. at 485, 98 S.Ct. at 1179-1180, petitioner submits that the failure of his defense attorney to assume that obligation should not be attributable to

petitioner.[7] The possibilities that some defense counsel might make untimely motions for separate counsel for dilatory purposes, or might misrepresent whether or not a conflict exists, are valid interests which trial courts are able to explore and prevent. See Holloway, supra, 435 U.S at 485, 98 S.Ct. at 1180. When a conflict arises during trial, and the defense attorney fails to take the

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7. The American Bar Association in its Standards Relating to the Administration of Criminal Justice -- The Defense Function § 3.5(b), at 123 (1974) cautions:

> "Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

proper action, it is the trial court's duty to intervene to "protect the right of an accused to have the Assistance of Counsel." Glasser v. United States, 315 U.S. at 71, 62 S.Ct. at 465. Here, there was no inquiry of the petitioner by the trial court concerning his satisfaction with joint counsel when such an inquiry should have been made. The Sixth Amendment, applicable to the states through the Fourteenth Amendment, requires the trial court to take positive steps to insure that a defendant's representation by counsel is without conflict of interest when such a conflict presents itself. Id.

CONCLUSION

For the reasons stated above, this Court is respectfully requested to issue a Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Of Attorneys for Petitioner

APPENDIX

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JERRY GEORGE MYHRVOLD,
Petitioner-Appellant,

vs.

GEORGE E. SULLIVAN, Superintendent,
Oregon State Correctional Institution,
Respondent-Appellee.

No. 80-3445
D.C. No. CV 79-972-E
MEMORANDUM

Argued and submitted — April 14, 1981

Decided — May 19, 1981

Appeal from the United States District Court
for the District of Oregon
Robert C. Belloni, District Judge, Presiding

Before: TANG and CANBY, Circuit Judges, and D. WILLIAMS*, District Judge.

MYHRVOLD appeals the denial of his habeas petition after conviction in state court of rape. Petitioner and his two codefendants, Morton and Bethell, retained and were represented by the same lawyer who, in consultation with the defendants, determined before trial that no conflict of interest would ensue. During the trial, Bethell admitted having intercourse with the victim in the cab of his truck, but maintained that it was consensual. On cross-examination, Bethell testified that he believed that the petitioner, "instead of having intercourse with her right then ... stuck his nose up there." Bethell did not see petitioner's actions in the cab, but stated that "his [petitioner's] feet were still out of the pickup, so what else could [he] be doing? ... I'm just estimating on that." Myhrvold then took the stand, and insisted that he had no contact with the victim and that his

*Honorable David W. Williams, United States District Judge for the Central District of California, sitting by designation

participation consisted of going to the cab of the truck, looking at the victim, and returning to the rear of the vehicle to join his companions.

Myhrvold contends that joint representation violated his Sixth Amendment right to the effective assistance of counsel. He argues that the inconsistency between his testimony and that of his co-defendant damaged his credibility, and that joint representation prevented his lawyer from rehabilitating him except at the expense of his other client. In order to establish a violation of the Sixth Amendment, the petitioner, who raised no objection at trial, has the burden of demonstrating that an actual conflict of interest existed which adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *United States v. Kutas*, 542 F.2d 527, 529 (9th Cir. 1976) *cert. denied*, 429 U.S. 1073 (1977). A conflict of interest arises "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing." *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975). The determination of whether or not a conflict of interest exists turns on the particular facts of each case. *Willis v. United States*, *supra*, 614 F.2d at 1204; *Peek v. United States*, 321 F.2d 934, 944 (9th Cir. 1963) *cert. denied*, 376 U.S. 954 (1964). A defendant must demonstrate that his counsel actively represented conflicting interests. *Cuyler v. Sullivan*, *supra*, 446 U.S. at 349-50. This standard ensures that defendants receive adequate representation while preventing them from second-guessing on appeal their attorney's trial strategy. *Willis v. United States*, *supra*, 614 F.2d at 1203.

It is undeniable that Bethell and petitioner gave testimony as to the latter's conduct which a jury could have found conflicting and which may have undercut either petitioner's or Bethell's credibility. The particular facts of this case, however, demonstrate that this does not amount to a showing of an actual conflict of interest which adversely affected the petitioner's lawyer's performance. Petitioner does not contend that separate representation would have enabled him to advance a defense other than the one which the co-defendants agreed upon beforehand and subsequently advanced at trial. More importantly, there is no contention, and certainly no evidence, that petitioner's lawyer's choice of defense strategy was rooted in a conflict of interest. That the strategy was ultimately unsuccessful in part because one defendant failed to adhere to the agreed upon version of the incident is not proof that the defense strategy either before or

during the trial was tainted by a conflict of interest. *Willis v. United States, supra,* 614 F.2d at 1205; *United States v. Wisniewski,* 478 F.2d 274, 285 (2d Cir. 1973).

Since the choice of defense was not tainted by any conflict of interest, the only remaining question is whether the petitioner's attorney's alleged inability to impeach Bethell adversely affected the attorney's ability to advance the defense selected by the defendants. The answer is clearly negative. The defendants chose a coordinated defense designed to exculpate all of them. Their version, even with the inconsistencies between Bethell's and petitioner's trial testimony, was completely at odds with the victim's version. As the Oregon Court of Appeals noted, the central issue at trial was whether to believe the victim's version or the defendants' version of the incident. Given the joint nature of the defense, petitioner did not stand to gain significantly by impeaching Bethell's credibility since that would have undercut his own defense. The District Court was clearly correct in finding that the petitioner's interests were best served by stressing the consistencies of the two defendants' testimony and urging upon the jury the truthfulness of petitioner's testimony where the two versions differed. The conflicting testimony may have damaged the likelihood that the joint defense would have succeeded, but did not adversely affect a single joint defense attorney's ability to advance it any more than it would have adversely affected the ability of separate defense attorneys to advance the same defense. Since the conflicting testimony, in light of the facts of the case, did not give rise to an actual conflict of interest which could have adversely affected the performance of the defense attorney, it is immaterial that petitioner did not have separate representation.

AFFIRMED.

RECORDER SUNSET PRESS SAN FRANCISCO CA 6-1-81—550

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JERRY GEORGE MYRHVOLD Petitioner, v. GEORGE E. SULLIVAN, Superintendent, Oregon Correctional Institution, Respondent.	)	Civil No. 79-972-E O R D E R

After review of the file in this case, I adopt the magistrate's findings and recommendation.

This proceeding is dismissed. The Clerk is directed to enter judgment accordingly.

DATED this 3rd day of September, 1980.

/s/
U.S. DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JERRY GEORGE MYHRVOLD Petitioner, v. GEORGE E. SULLIVAN, Superintendent, Oregon Correctional Institution, Respondent.	)	Civil No. 79-972-E FINDINGS AND RECOMMENDATIONS

Jerry George Myhrvold, petitioner, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner is presently free on bail. On December 8, 1976, he was convicted in the Circuit Court of Oregon for Linn County of Rape in the First Degree. The court sentenced him to an indeterminate prison term of four years. The Oregon Court of Appeals affirmed the conviction. State v. Myhrvold, 31 Or App 113, 566 P2d 545 (1977).

Petitioner then sought post-conviction relief [ORS 138.510-138.680] on the ground that his attorney's joint representation of the three co-defendants suffered from a conflict of interest and thereby denied petitioner effective assistance of counsel. The Circuit Court of Oregon for Marion County granted relief after an evidentiary hearing and ordered a new trial. Upon appeal by the state, the Oregon Court of Appeals reversed the Circuit Court and reinstated the judgment. Myhrvold v. Sullivan, 30 Or App 349, 595 P2d 494 (1979).

Petitioner now raises the same issue in federal habeas corpus. Respondent denies that petitioner has stated a claim for relief, and moves for dismissal.

STATEMENT OF FACTS

On September 5, 1976, petitioner and his two co-defendants, Bethell and Morton, offered a local sixteen year old girl a ride home from a drive-in. They had been drinking most of

the day, and had asked her earlier in the evening if she would like to go drinking with them. She had refused. Later she accepted the ride home, but the three men took her instead to a deserted road and stopped. According to the girl's testimony at trial, Bethell told her that she could go home after "he got what he wanted" and grabbed at her hands. Trial Transcript (Tr.), 19. She struggled, and Bethell had his friends hold her arms. Bethell then stripped and raped her (Tr. 21-25). The men then changed places, and petitioner and Morton also raped her (Tr. 25-27). Bethell then raped her again, (Tr. 29), and the three dropped her off about a mile from her home. The prosecutrix testified that two or three of the co-defendants remained in the cab and cooperated during the incident by one or two holding her while another raped her.

All three defendants testified at the subsequent trial. Their testimony

corresponded with that of the prosecutrix up to the time of the alleged rape. According to Bethell, he and the prosecutrix began undressing each other and the other two men left the cab to sit on the pickup's tailgate. Bethell said he'd had too much to drink to have intercourse and eventually asked the prosecutrix if she'd like one of the others (Tr. 130-31). He then left the cab and petitioner went forward and leaned into the truck (Tr. 131). After a few minutes, petitioner returned and Morton went forward. Id. Bethell said he didn't know if the others actually had intercourse with the girl, but thought petitioner might have had oral sex, judging from his position in the cab (Tr. 132, 139-40). Bethell admitted he had intercourse on his second attempt but claimed the prosecutrix consented (Tr. 131). Petitioner denied having intercourse or oral sex, and said he merely leaned into the cab for a minute and then withdrew (Tr. 149). Morton

also said he just looked into the cab (Tr. 161, 167). Both petitioner and Morton testified that Bethell had intercourse with the girl, but denied any knowledge of the other's actions in the cab.

All three defendants were represented by the same attorney, who had originally been retained by Bethell. According to testimony at the post-conviction proceeding, each of the men told the attorney basically the same story on several occasions. Even so, the attorney advised petitioner and Morton to obtain separate counsel if they felt there might be a conflict of interest. Post-Conviction Hearing Transcript (Hearing Tr.) 12, 15-16, 62. Although the two did contact another attorney shortly before the trial, the other attorney requested his fee in advance. Petitioner and Morton decided not to pursue the matter (Hearing Tr. 12,13,21,23). Aside from Bethell's speculation that petitioner had oral sex with the victim and a minor variation in

the estimated time petitioner spent in or near the cab, the testimony of the three defendants coincided in all respects.

OPINION

Joint representation of multiple defendants does not result in an automatic violation of the Sixth Amendment. Holloway v. Arkansas, 435 US 475, 482 (1978). To merit habeas corpus relief, a petitioner must show that (1) actual conflict of interest existed, and (2) that he suffered actual prejudice as a result of that conflict. United States v. Eaglin, 571 F2d 1069, 1086 (9th Cir. 1977), cert. denied, 435 US 906 (1978). If the testimony of the co-defendants is inconsistent, that inconsistency rises to a constitutional level only if "one defendant stands to gain significantly by . . . evidence or . . . arguments that are damaging to [another] defendant [represented by the same counsel]." Foxworth v. Wainwright, 516 F2d 1072, 1076 (5th Cir. 1975). See also United

States v. Marshall, 488 F2d 1169 (9th Cir. 1975).

Petitioner argues that the differences in Bethell's testimony amounted to such a conflict. He alleges that their attorney did not adequately explain the potential conflict and, accordingly, petitioner could not make a knowing and intelligent waiver. He also claims the court should have inquired into the existence of a possible conflict to ensure adequacy of representation and an impartial trial. See e.g., United States v. Vargas-Martinez, 569 F2d 1102 (9th Cir. 1978). However, I am not convinced that the reputed conflict ever existed. Inconsistencies between co-defendants do not violate the right to effective assistance of counsel unless the conflict is actual and significant. United States v. Alvarez, 580 F2d 1251 (5th Cir. 1978).

First, Bethell admitted that he was quite intoxicated, was uncertain of the time, and

did not know for certain what petitioner did or did not do in the cab. This indefiniteness was mainly elicited by the prosecution, so petitioner's claim that the state capitalized on the inconsistency to undermine petitioner's story is not completely accurate. Second, Bethell had nothing to gain by lying about petitioner's actions in the cab. He had already admitted his own intercourse with the prosecutrix and relied on his co-defendants' colloboration that she had consented. Accordingly, their attorney could serve the best interests of Bethell by arguing the truthfulness of petitioner's story, not its inconsistencies. And finally, Bethell's story coincided with petitioner's and Morton's in all other respects, creating a united defense against the victim's charge of forcible rape. The stories told by the defendants at trial were not materially different. In these circumstances, I do not find a conflict that rises to a constitutional level, and, if such

a conflict existed, no evidence that petitioner suffered actual prejudice."

This proceeding should be dismissed and judgment entered accordingly.

DATED this 5th day of August, 1980.

/s/ Michael R. Hogan
UNITED STATES MAGISTRATE

APPENDIX "D"

July 25, 1979

Paul J. De Muniz
Attorney at Law
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Salem, OR 97308

RE: Myhrvold vs. Sullivan
CA 12430 SC 26314

Dear Mr. De Muniz:

The Supreme Court on July 24, 1979, denied Respondent's Petition for Review in the above-entitled matter.

Very truly yours,

/s/ Marilyn Hartley

MARILYN HARTLEY
Supreme Court Calendar Clerk

MH/vr
cc: Walter L. Barrie

APPENDIX "E"

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

JERRY GEORGE MYRHVOLD Respondent, v. GEORGE E. SULLIVAN, Superintendent, Oregon Correctional Institution, Appellant.	)	No. 106672 CA 12430

Appeal from Circuit Court, Marion County

Clarke Brown, Judge

Argued and submitted March 20, 1979.

Scott McAlister, Assistant Attorney General, Salem, argued the cause for appellant. With him on the brief were James A. Redden, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

Paul J. De Muniz, Salem, argued the cause for respondent. With him on the brief was Garrett, Seideman, Hemann & Robertson, P.C., Salem.

Before Schwab, Chief Judge, and Tanzer, Richardson and Roberts, Judges.

TANZER, J.

Reversed FILED May 21, 1979

TANZER, J.

Petitioner Myhrvold was convicted of first-degree rape after a trial at which he and two codefendants were represented by the same attorney. He sought post-conviction relief on the ground that he had been denied effective assistance of counsel and due process of law in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 11 of the Oregon Constitution. The post-conviction trial court granted relief, and the state appeals. The issue is whether petitioner was denied effective assistance of counsel due to a conflict of interest among the codefendants. We find no conflict of interest and reverse.

Myhrvold and two others, Morton and Bethell, were charged in a single indictment with first-degree rape arising from the same incident. Bethell retained the services of a law firm and consulted with one of its

attorneys.[1] Thereafter, Myhrvold and Morton consulted Bethell's attorney, who agreed to represent them if there was no conflict of interest between them and Bethell.[2] The three defendants discussed the matter among themselves and found no conflict. Together, they reviewed their versions of the events in question with the attorney on three or four occasions before trial, and no inconsistencies in their stories were found.[3] Bethell admitted having had intercourse with the alleged victim but claimed that it was with her consent, while Myhrvold and Morton denied having had any intercourse or sexual contact with the alleged victim. Their versions of the transaction were all consistent.

The primary question for the jury at defendants' consolidated trial was whether to believe the victim or the defendants. The victim, 16, testified that she had been acquainted with the defendants for several years but had never dated any of them. At

about 10:30 p.m. on the night in question, she accepted their offer to give her a ride from the town of Scio to her home several miles away. After a stop for defendant to obtain more beer from the back of the pickup, they drove toward the victim's home. However, they turned off that route at a "Y" intersection about a mile from her house and parked the truck at a secluded place on Roger's Mountain, where Bethell said they were going to shoot deer. Up to this point, the victim's and defendants' versions of the events differ only as to details which are not significatnt for purposes of this opinion.

The victim testified that after parking the truck, defendants got out of the truck to get more beer. After they returned, all four sat in the truck for several minutes. Soon, Bethell began making suggestive remarks to her; she replied that she wanted to go home. He told her that she was not going home until he got what he wanted. Then he grabbed her

wrists and attempted to undo her pants. She tried to stop him, but he was too strong; she screamed, and he threatened to hit her in the mouth or tape it shut. She testified that Bethell then asked Myhrvold and Morton to hold her down; they grabbed hold of her arms and pinned her to the seat. While she continued to struggle, Bethell took off her pants and had intercourse with her. Then Myhrvold held her down while Morton had intercourse with her. After that, Myhrvold did the same while one or two of the others held her. She continued to scream, and they continued to threaten her and tell her to shut up. Finally, Bethell had intercouse with her for a second time.

After the victim dressed, they drove back down the road and let her out at the "Y" intersection, about a mile from her home. She sought help at the nearest house. Her mother and the police were called; after they arrived, the victim was taken to the hospital

for an examination. The remainder of the story is not relevant here.

Bethell was the first defendant to take the stand. He testified that after they parked the truck on Roger's Mountain, they sat in the truck for a while and then he said to the victim, "I would like to play." Soon they undid each other's pants, and she pulled her pants down. Myhrvold and Morton got out of the truck, and Bethell and the victim lay down on the seat. He was too drunk to have intercourse with her, so he asked if she wanted to have one of the other guys, and she said "okay." He called Myhrvold, who went up to the cab while Bethell went to the back of the truck. When Myhrvold returned, he told Morton, "It's your turn," and Morton took his turn in the cab. Bethell testified that he did not know what the other two did in the cab. Then he returned to the cab and had intercourse with her. At no time, according to Bethell, did she object in any way.

On cross-examination, Bethell amplified his description of Myhrvold's activity in the cab. Bethell had no watch, but he estimated that he and Morton waited for five to ten minutes while Myhrvold was in or near the cab of the truck. Bethell also testified that Myhrvold did not get into the cab right away, but was just "checking it out" and that he inferred that "instead of having intercourse with her right then, he stuck his nose up there." He explained that he was not watching, but "his feet were still out of the pickup, so what else could [he] be doing? * * * I'm just estimating on that."[4] Bethell did not remember if Myhrvold said anything when he returned to the back of the pickup.

Myhrvold's account of his actions was slightly different from Bethell's. According to him, after they parked the truck on Roger's Mountain, they sat listening to the radio for a few minutes until he looked over and saw the victim's pants down below her knees. Bethell

nudged him, and he and Morton then got out of the pickup and waited by the tailgate. Several minutes later, Bethell got out and told him to go up to the cab. Myhrvold approached the cab on the driver's side and saw the victim lying on the seat. He leaned into the pickup for about a minute, looked at her, thought about what he would do, and then backed off. He did not get up on the seat and did not have intercourse with her. Instead, he walked back to the tailgate and told Morton to go ahead.

On cross-examination of Myhrvold, the prosecutor emphasized the inconsistencies between Bethell's and Myhrvold's testimony about the latter's behavior:

> "Q Did you hear him [Bethell] testify when he saw you go up there, he saw you laying on the seat with just your feet sticking out and you were in there for about five minutes?
>
> "A I don't recall him saying that.

"Q You don't recall him saying that -- but that isn't what happened?

"A No -- well, no. I wasn't laying in the seat."

Myhrvold contends that Bethell's testimony, especially as highlighted by the prosecutor's cross-examination of Myhrvold, damaged his credibility. He argues that if his attorney had not been fettered by his duty to Bethell, he could have challenged the accuracy of the latter's testimony about Myhrvold.

The right to effective assistance of counsel guaranteed by the Sixth Amendment requires that such assistance be unimpaired by counsel's simultaneous representation of conflicting interests. Holloway v.Arkansas, 435 US 475, 482, 98 SCt 1173, 55 LEd2d 426 (1978); Glasser v. United States, 315 US 60, 70, 62 SCt 457, 86 LEd 680 (1942).[6] The assistance of counsel is among the "constitutional rights so basis

to a fair trial that their infraction can never be treated as harmless error." Holloway v. Arkansas, 435 US at 489, quoting Chapman v. California, 386 US 18, 23, 87 SCt 824, 17 LEd2d 705 (1967). Where there is an actual conflict of interest among codefendants represented by a single attorney and the defendants have not waived their rights to effective assistance of counsel, reversal of their convictions is required even without a showing of prejudice.

Representation of codefendants does not necessarily deny a defendant's right to counsel. Indeed, joint representation in certain cases may benefit each of the codefendants. Holloway v. Arkansas, 435 US at 482-83. Substantial inconsistency in the defenses tendered by joint defendants may infect joint representation to the point of a denial of the right to counsel, but not every inconsistency in the

testimony of codefendants amounts to a conflict of interest. A conflict of interest arises "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." Foxworth v. Wainwright, 516 F2d 1072, 1076 (5th Cir 1975). An inconsistency or conflict between codefendants does not violate the right to effective assistance of counsel if it is irrelevant or merely hypothetical; a violation exists only if the conflict is actual and significant. United States v. Alvarez, 580 F2d 1251, 1255 (5th Cir 1978).

In this case, the two inconsistencies between the testimony of Bethell and that of Myhrvold were not significant in relation to the issues of the trial. The first inconsistency was that Myhrvold testified on cross-examination that he

leaned into the cab of the pickup truck for "maybe a minute"; when Bethell was asked on cross-examination how long Myhrvold was at the front of the pickup, he stated, "I couldn't say. I didn't have a watch. I could estimate approximately five, ten minutes, I don't know." Given Bethell's lack of certainty, the testimony of both men that they had been drinking all day and paid little attention to what the other did in the cab, the damage to Myhrvold's credibility, if any, was negligible.[7]

The second inconsistency was that Myhrvold testified that he leaned into the truck, looked at the victim, and then backed off; Bethell testified, again on cross-examination, that he "estimated" from Myhrvold's position that Myhrvold had had some sexual contact with the victim.[8] Again, Bethell's statement was admittedly an inference; he also testified that he was not watching what Myhrvold was doing.

Neither codefendant contradicted Myhrvold in any significant way. Both Myhrvold's and Bethell's accounts contradicted the victim's testimony that she had been forcibly raped with two or three of the defendants present in the cab throughout the incident. Viewed in relation to the victim's version of the incident, the discrepancies in Bethell's and Myhrvold's testimony were insignificant because nothing in Bethell's account tended to confirm the victim's version of Myhrvold's actions. Bethell and Myhrvold agreed that none of the three codefendants forced the victim to engage in any sexual activity. The testimonial discrepancies were within the expected range of variation of human memory and did not relate significantly to any material issue at trial. Therefore, we conclude that this record discloses no conflict of interest between these two codefendants. It follows

that there was no denial of the effective assistance of counsel.

Reversed.

FOOTNOTES

1. The codefendants were interviewed by one attorney and represented at trial by another attorney in the same firm.

2. The professional standards and ethical problems relating to the joint representation of criminal codefendants are discussed in In re Porter, 283 Or 517, 584 P2d 744 (1978). Here, we address only defendant's constitutional right to effective assistance of counsel rather than the propriety of undertaking

joint representation.

3. There is no evidence in the record to support the post-conviction trial court's finding that the attorney knew or should have known that the codefendants would give conflicting testimony. The testimony of petitioner and the lawyer are both to the contrary.

4. Myhrvold testified at the post-conviction trial that he was surprised by this portion of Bethell's testimony.

5. This characterization of Bethell's testimony was not completely accurate, but defendants' attorney made no objection.

6. Although both these cases involved appointed counsel, other cases apply the same principle to retained counsel as well. See United States v. Alvarez, 580 F2d 1251, 1256 (5th Cir 1978).

7. In fact, if there had been absolutely no discrepancies in their testimony, the jury might well have inferred that their accounts were too pat and had been fabricated.

8. Although Bethell's testimony on this point is vague and inartful, we infer that the gist of his testimony, set out on page 5, supra, is that he thought Myhrvold had sexual contact with the victim.

IN THE COURT OF APPEALS
FOR THE STATE OF OREGON

JERRY GEORGE MYRHVOLD Respondent, v. GEORGE E. SULLIVAN, Superintendent, Oregon Correctional Institution, Respondent.	Circuit Court No. 106672 CA 12430 JUDGMENT AND MANDATE Appeal from Marion County

This cause having come on to be heard on appeal and having been duly submitted and considered and petition for review having been denied by the Supreme Court on July 24, 1979:

IT IS HEREBY ADJUDGED AND ORDERED that the decision entered below is reversed and the cause remanded to said court for further proceedings pursuant to law and this Court's decision and opinion herein rendered May 21, 1979.

IT IS FURTHER ORDERED that appellant recover from respondent costs and

disbursements in this court in the amount of $75.

ISSUED at Salem, Oregon: August 9, 1979.

STATE OF OREGON)
County of Marion)

I, LOREN D. HICKS, State Court Administrator for the State of Oreogn, do certify that this copy of ORDER is a correct transcript of the original, which is on file in my office.

IN TESTIMONY WHEREOF, I have affixed the seal of the Court at Salem, Oregon, this _____.

LOREN D. HICKS
State Court Administrator

By:_____
Deputy Administrator

APPENDIX "F"

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

Case No. 106672

JERRY GEORGE MYRHVOLD)
)
Petitioner,)
)
v.)
)
GEORGE E. SULLIVAN,)
Superintendent, Oregon)
Correctional)
Institution,)
)
Defendant.)

AMENDED ORDER GRANTING
POST-CONVICTION RELIEF

This matter having come before the Court on September 15, 1978, and the Court having heard testimony and having reviewed the exhibits offered and received into evidence, the Court, after a complete and thorough review, makes the following:

FINDINGS OF FACT

I.

Petitioner is presently imprisoned in the Oregon State Correctional Institution at 3405 Deer Park Dr., SE, Salem, Oregon, by the above-named defendant, George E. Sullivan, Superintendent of the Oregon State Correctional Institution.

II.

The aforesaid imprisonment is by virtue of a judgment and sentence imposed by the Circuit Court of the State of Oregon for the County of Linn, entered on or about the 3rd day of February, 1977, in the case of State of Oregon v. Jerry George Myhrvold, Linn County Case No. 48460.

III.

Said judgment and sentencing order purports to sentence petitioner to the legal and physical custody of the Oregon State Corrections Division for a term not to exceed four years.

IV.

Petitioner was charged in the foregoing proceeding with the crime of rape in the first degree; said charges being in the form of a Linn County grand jury indictment, filed on or about the 30th day of September, 1976.

V.

The grand jury indictment also charged Richard David Bethell and Roger William Morton as co-defendants. All three defendants, including petitioner herein, entered pleas of not guilty, whereafter, a consolidated trial was held for all defendants before a jury.

VI.

Prior to arraignment, petitioner, Richard David Bethell and Roger William Morton, were represented by an associate of Mr. C.S. Emmons, Richard J. McCormick. At arraignment, petitioner and the two other co-defendants entered pleas of not guilty

and Mr. McCormick represented to the Court that he was the attorney for all three defendants and requested a consolidated trial.

VII.

Prior to trial, the three co-defendants, including petitioner, discussed the case with Mr. McCormick and Mr. Emmons. Petitioner's trial attorney and the trial attorney for all co-defendants, was Mr. C.S. Emmons, licensed to practice law in the State of Oregon by the Oregon Supreme Court.

VIII.

Petitioner's trial attorney did not move or take exception to the consolidation of the trials of the co-defendants in the above-entitled case.

IX.

The petitioner and co-defendants were advised by Mr. C.S. Emmons' associate, Mr. Richard J. McCormick, for the three co-

defendants to "get together" outside the presence of their attorneys and determine whether there was a conflict of interest.

X.

Petitioner's trial attorney knew, prior to trial, that each of the co-defendants, petitioner included, had given conflicting, inculpatory and exculpatory accounts prior to trial concerning the incident allegedly occurring on or about September 6, 1976, involving the alleged rape of the female described in the grand jury indictment.

XI.

Petitioner's trial attorney called each of the co-defendants as witnesses, including petitioner, during the trial and petitioner and the co-defendants gave conflicting testimony relating to the alleged acts of sexual intercourse, occurring on or about September 6, 1976.

XII.

Petitioner's trial attorney knew, prior to trial, that Richard David Bethell admitted to consentual intercourse with the alleged victim but that petitioner and Roger William Morton denied having sexual intercourse or sexual contact with the alleged victim on the night in question.

XIII.

Petitioner's trial attorney knew, prior to trial, that petitioner had advised the police on the night of his arrest, hours after the alleged incident, that he was not with the victim at any time during the preceding evening.

XIV.

Petitioner's attorney knew, prior to trial, that Richard David Bethell, a co-defendant, was going to testify that petitioner appeared to have sexual contact with the alleged victim on the night in question and said allegation was going to

be denied by petitioner. Petitioner's trial attorney also knew, prior to trial, that Roger William Morton was going to give conflicting statements and testimony with regard to the conduct and activities of petitioner at the time and place of the incident.

XV.

Petitioner's trial attorney knew, or reasonably should have known, based upon the conflicting testimony that he would be uanble to effectively confront and/or cross-examine the co-defendants of petitioner, who he knew would give conflicting testimony at trial.

XVI.

The Court finds the facts, as stated above, were determined beyond a reasonable doubt.

Based upon the above FINDINGS OF FACT and after a thorough review of the

testimony and exhibits, the Court makes the following

CONCLUSIONS OF LAW

I.

The above findings of fact convince the Court beyond a reasonable doubt, that petitioner was denied (a) the right to due process of law, (b) effective representation of counsel; and (c) was denied the right to a fair trial.

II.

Based upon the conflicting testimony of the co-defendants, petitioner's trial attorney was unable to provide effective representation of counsel based upon a conflict of interest between his clients, to effectively confront and cross-examine the co-defendants who gave conflicting testimony with that of petitioner during the trial, thereby causing petitioner to suffer substantial prejudice so as to deny defendant his rights, under Article I, § 9,

10 and 11 of the Oregon Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The Court, after having made the above findings of facts and conclusions of law;

HEREBY ORDERS

The conviction, based upon a judgment and sentence order heretofore entered on or about February 3, 1977, in the case of State of Oregon v. Jerry George Myhrvold, Linn County Case No. 48460, is reversed and vacated, with the case being remanded to the Linn County Circuit Court for a new trial.

IT IS FURTHER ORDERED that defendant release Jerry George Myhrvold to the custody of the Linn County Sheriff or his designated representative, and that the Linn County Sheriff transport said petitioner to the Linn County Sheriff's Office, located at the Linn County Courthouse, Albany, Oregon, for further

proceedings consistent with this opinion.

DATED this 11th day of October, 1978.

/s/ Clarke C. Brown
CIRCUIT COURT JUDGE

APPENDIX "G"

31 Or App 113

STATE OF OREGON, Respondent,

v.

JERRY GEORGE MYHRVOLD, Roger William Morton, Richard David Bethell, Appellants.

Court of Appeals of Oregon.

Argued and Submitted Sept. 21, 1977.

Decided Oct. 4, 1977.

Appeal from Circuit Court, Linn County,

Courtney R. Johns, Judge

Gary D. Babcock, Public Defender, Salem, argued the cause and filed the brief for appellants.

Thomas H. Denney, Asst. Atty. Gen., Salem, argued the cause for respondent. With him on the brief were James A. Redden, Atty. Gen., and W. Michael Gillette, Sol. Gen., Salem.

Before SCHWAB, C.J., and THORNTON and TANZER, JJ.

PER CURIAM

Affirmed. See State v. Henley, Or. App., 569 P2d 58 (decided this date).

APPENDIX "H"

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR LINN COUNTY

THE STATE OF OREGON	)	
	)	
Plaintiff,	)	
	)	
vs.	)	O R D E R
	)	
JERRY GEORGE MYHRVOLD,	)	No. 48460
	)	
Defendant.	)	

THIS MATTER coming on regularly for hearing on the 3rd day of February, 1977, the State of Oregon appearing by and through the District Attorney for Linn County, Oregon, and the defendant appearing in person and with attorney, C.S. Emmons, and said defendant having heretofore and on December 8, 1976, been found guilty of the crime of Rape in the First Degree, committed September 6, 1976, and the Court having set this date for sentencing, and said defendant being fully advised, did

waive hearing in mitigation of sentence, and the State having waived hearing in aggravation of sentence, and statements of counsel having been heard and the Court being fully advised,

NOW, THEREFORE, IT IS HEREBY ORDERED that said defendant shall be and is hereby sentenced to imprisonment, without limitation of time for a period of four (4) years and for such purpose said defendant shall be and is hereby committed to the legal and physical custody of the Corrections Division of the State of Oregon at Salem, Oregon.

DATED this _____ day of February, 1977.

/s/ Courtney R. Johns
CIRCUIT JUDGE

Appendix

Office-Supreme Court, U.S.
FILED
AUG 27 1981
ALEXANDER L. STEVAS,
CLERK

81-377

No._____

IN THE SUPREME COURT OF THE UNITED STATES

Term 198__

JERRY GEORGE MYHRVOLD,

Petitioner,

vs.

GEORGE E. SULLIVAN, Superintendent,
Oregon State Correctional Institution,

Respondent.

SUPPLEMENTAL APPENDIX

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APPENDIX "A"

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JERRY GEORGE MYHRVOLD,
Petitioner-Appellant,

vs.

GEORGE E. SULLIVAN, Superintendent,
Oregon State Correctional Institution,
Respondent-Appellee.

No. 80-3445
D.C. No. CV 79-972-E
MEMORANDUM

Argued and submitted — April 14, 1981

Decided — May 19, 1981

Appeal from the United States District Court
for the District of Oregon
Robert C. Belloni, District Judge, Presiding

Before: TANG and CANBY, Circuit Judges, and D. WILLIAMS*, District Judge.

MYHRVOLD appeals the denial of his habeas petition after conviction in state court of rape. Petitioner and his two codefendants, Morton and Bethell, retained and were represented by the same lawyer who, in consultation with the defendants, determined before trial that no conflict of interest would ensue. During the trial, Bethell admitted having intercourse with the victim in the cab of his truck, but maintained that it was consensual. On cross-examination, Bethell testified that he believed that the petitioner, "instead of having intercourse with her right then ... stuck his nose up there." Bethell did not see petitioner's actions in the cab, but stated that "his [petitioner's] feet were still out of the pickup, so what else could [he] be doing? ... I'm just estimating on that." Myhrvold then took the stand, and insisted that he had no contact with the victim and that his

*Honorable David W. Williams, United States District Judge for the Central District of California, sitting by designation.

participation consisted of going to the cab of the truck, looking at the victim, and returning to the rear of the vehicle to join his companions.

Myhrvold contends that joint representation violated his Sixth Amendment right to the effective assistance of counsel. He argues that the inconsistency between his testimony and that of his co-defendant damaged his credibility, and that joint representation prevented his lawyer from rehabilitating him except at the expense of his other client. In order to establish a violation of the Sixth Amendment, the petitioner, who raised no objection at trial, has the burden of demonstrating that an actual conflict of interest existed which adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *United States v. Kutas*, 542 F.2d 527, 529 (9th Cir. 1976) *cert. denied*, 429 U.S. 1073 (1977). A conflict of interest arises "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing." *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975). The determination of whether or not a conflict of interest exists turns on the particular facts of each case. *Willis v. United States*, *supra*, 614 F.2d at 1204; *Peek v. United States*, 321 F.2d 934, 944 (9th Cir. 1963) *cert. denied*, 376 U.S. 954 (1964). A defendant must demonstrate that his counsel actively represented conflicting interests. *Cuyler v. Sullivan*, *supra*, 446 U.S. at 349-50. This standard ensures that defendants receive adequate representation while preventing them from second-guessing on appeal their attorney's trial strategy. *Willis v. United States*, *supra*, 614 F.2d at 1203.

It is undeniable that Bethell and petitioner gave testimony as to the latter's conduct which a jury could have found conflicting and which may have undercut either petitioner's or Bethell's credibility. The particular facts of this case, however, demonstrate that this does not amount to a showing of an actual conflict of interest which adversely affected the petitioner's lawyer's performance. Petitioner does not contend that separate representation would have enabled him to advance a defense other than the one which the co-defendants agreed upon beforehand and subsequently advanced at trial. More importantly, there is no contention, and certainly no evidence, that petitioner's lawyer's choice of defense strategy was rooted in a conflict of interest. That the strategy was ultimately unsuccessful in part because one defendant failed to adhere to the agreed upon version of the incident is not proof that the defense strategy either before or

during the trial was tainted by a conflict of interest. *Willis v. United States, supra,* 614 F.2d at 1203; *United States v. Wisniewski,* 478 F.2d 274, 285 (2d Cir. 1973).

Since the choice of defense was not tainted by any conflict of interest, the only remaining question is whether the petitioner's attorney's alleged inability to impeach Bethell adversely affected the attorney's ability to advance the defense selected by the defendants. The answer is clearly negative. The defendants chose a coordinated defense designed to exculpate all of them. Their version, even with the inconsistencies between Bethell's and petitioner's trial testimony, was completely at odds with the victim's version. As the Oregon Court of Appeals noted, the central issue at trial was whether to believe the victim's version or the defendants' version of the incident. Given the joint nature of the defense, petitioner did not stand to gain significantly by impeaching Bethell's credibility since that would have undercut his own defense. The District Court was clearly correct in finding that the petitioner's interests were best served by stressing the consistencies of the two defendants' testimony and urging upon the jury the truthfulness of petitioner's testimony where the two versions differed. The conflicting testimony may have damaged the likelihood that the joint defense would have succeeded, but did not adversely affect a single joint defense attorney's ability to advance it any more than it would have adversely affected the ability of separate defense attorneys to advance the same defense. Since the conflicting testimony, in light of the facts of the case, did not give rise to an actual conflict of interest which could have adversely affected the performance of the defense attorney, it is immaterial that petitioner did not have separate representation.

AFFIRMED.

RECORDER-SUNSET PRESS, SAN FRANCISCO, CA 6-1-81—550

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Opposition

Office - Supreme Court, U.S.
FILED
SEP 30 1981
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CLERK

No. 81-377

In the Supreme Court of the United States

OCTOBER TERM, 1981

JERRY GEORGE MYHRVOLD,

Petitioner,

v.

GEORGE E. SULLIVAN, Superintendent,

Oregon State Correctional Institution,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent submits that the question presented by the petition is more accurately stated as follows:

Whether joint legal representation of multiple defendants in a criminal trial constitutes ineffective assistance of counsel when one defendant unexpectedly gives testimony at trial that is inconsistent with the testimony of a co-defendant in any respect.

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Myhrvold v. Sullivan, 40 Or. App. 349, 595 P.2d 494 (1979)	1
Sumner v. Latta, ____ U.S. ____, 101 S. Ct. 764, 66 L.Ed.2d 722 (1981)	2

Respondent George E. Sullivan, Superintendent of the Oregon State Correctional Institution, respectfully prays that this Court deny petitioner Jerry George Myhrvold's petition for writ of certiorari. The petition seeks review of the decision of the United States Court of Appeals for the Ninth Circuit in *Myhrvold v. Sullivan,* No. 80-3445 (9th Cir. May 19, 1981) (unpublished memorandum opinion).

STATEMENT OF THE CASE

Respondent submits that the petitioner's "Factual History" (Pet. 9-13) under his statement of the case is incomplete. The facts of the petitioner's case were succinctly summarized by the Ninth Circuit Court of Appeals (Pet., App. A, 23-24). A thorough rendition of the facts appears in the opinion of the Oregon Court of Appeals which rejected, in state appellate proceedings, the same constitutional claim that the petitioner presents to this Court. (Pet., App. E, 38-49). The Ninth Circuit considered the state court of appeals' factual statement and opinion, *Myhrvold v. Sullivan,* 40 Or. App. 349, 595 P.2d 494 (1979), in ruling on the petitioner's appeal of the district court's denial of his application for federal habeas corpus relief. *Myhrvold v. Sullivan,* No. 80-3445, slip op. at 3 (9th Cir. May 19, 1981). The respondent submits that the proper factual statement to be considered by this Court is the rendition of the facts in the state court opinion which

appears in Appendix E of the petition for writ of certiorari at pages 28-32. *See, Sumner v. Latta,* ____ U.S. ____ , 101 S. Ct. 764, 66 L.Ed.2d 722 (1981).

REASONS FOR DENYING THE PETITION

The issue presented by the petitioner has no significance beyond his particular case. The petitioner does not contend that the decision of the Ninth Circuit Court of Appeals is in conflict with a decision of another federal court of appeals or state court of last resort on the same issue. The Ninth Circuit's resolution of the issue presented is not in conflict with applicable decisions by this court in *Holloway v. Arkansas,* 435 U.S. 475 (1978) and *Glasser v. United States,* 315 U.S. 60 (1942). This Court has recently addressed the question of whether representation of multiple criminal defendants constitutes ineffective assistance of counsel in violation of the Sixth Amendment in *Cuyler v. Sullivan,* 446 U.S. 335 (1980). The Court should decline to exercise its discretion to review this matter on a writ of certiorari.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals correctly concluded that the petitioner had not been deprived of his Sixth and Fourteenth Amendment rights to effective assistance of counsel in his defense of state criminal charges. The petitioner raised no objection at trial to the joint representation of his interests and the inter-

ests of his co-defendants by a single defense attorney at a single trial. The petitioner and his co-defendants chose a coordinated defense against the crime victim's testimony that she had been gang-raped by the petitioner and his co-defendants. One of the petitioner's co-defendants unexpectedly gave testimony on cross-examination that conflicted with the petitioner's testimonial account of his activities at the crime scene. The conflict, however, was relatively minor in light of the fact that the testimony all the defendants contradicted the victim's account of the crime. The petitioner failed to demonstrate the existence of an actual conflict of interest. The petitioner did not demonstrate that he was prejudiced by his attorney's alleged inability to cross-examine and impeach the co-defendant who gave the partially conflicting testimony. Cross-examination of that defendant would have undercut the petitioner's defense which was, by the petitioner's choice, linked from the outset to his co-defendants' defenses. Because the petitioner failed to demonstrate that an actual conflict of interest adversely affected his lawyer's ability to advance the joint defense, the Ninth Circuit's decision to affirm the denial of habeas corpus relief was entirely consistent with the opinion of this Court in *Cuyler v. Sullivan, supra,* and the federal circuit court decisions cited therein. 446 U.S. at 348 n. 14.

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

In state criminal proceedings, a 16-year-old rape victim testified that petitioner Myhrvold and his co-defendants, Bethell and Morton, had held her down while each man engaged in forcible sexual intercourse with her. (Pet. App. 40-41). Petitioner and his co-defendants retained a single law firm to represent them in one trial. (Pet. App. 39). They gave their attorney consistent versions of the incident. They asserted that Bethell had engaged in consensual intercourse with the prosecutrix and that Morton and petitioner had not had any sexual intercourse or contact with her. (Pet. App. 39).

At their joint trial on charges of rape, Bethell testified that after he, Morton, and petitioner had picked up the prosecutrix, they drove to a secluded location in a pickup truck. (Pet. App. 42). According to Bethell, he and the prosecutrix engaged in consensual sexual foreplay but he was too drunk to have sexual intercourse with her at that time. He testified that the prosecutrix indicated that she wanted to engage in sexual activity with his companions and that petitioner and then Morton separately went up to the cab of the truck where the prosecutrix was waiting. Bethell said that after Morton took his turn at the cab, Bethell went back to the cab and had intercourse with

the prosecutrix. (Pet. App. 42). On cross-examination, Bethell said he estimated that the petitioner was at or near the cab of the truck for five to ten minutes. (Pet. App. 43). Bethell also said the petitioner was just "checking it out." Bethell inferred that "instead of having intercourse with her right then, [petitioner] stuck his nose up there." Bethell explained that he was not watching, but "[petitioner's] feet were still hanging out of the pickup, so what else could [petitioner] be doing." Behtell qualified his account by stating, "I'm just estimating on that." (Pet. App. 43).

Petitioner's account of his activities near the cab was slightly different. Petitioner said that after Bethell told him to go up to the cab, he approached and saw the prosecutrix lying on the seat. (Pet. App. 44). He testified that he leaned into the cab for approximately a minute but then backed off. He denied getting up on the seat and having sexual intercourse with the prosecutrix. (Pet. App. 44). On cross-examination the petitioner was asked if he recalled Bethell's testimony that Bethell saw the petitioner lying on the seat with his feet out of the cab and Bethell's testimony that petitioner had been in the cab for five minutes. (Pet. App. 44). Petitioner responded by saying that he did not recall Bethell giving such testimony and by denying that he was lying on the seat. (Pet. App. 45).

The petitioner and his co-defendants were convict-

ed of rape. In the Oregon appellate courts, the federal district court, and the Ninth Circuit Court of Appeals, the petitioner unsuccessfully contended that he had been deprived of his Sixth Amendment right to effective assistance of counsel. These courts rejected the petitioner's claim that his attorney's joint representation had precluded counsel from challenging the accuracy of co-defendant Bethell's testimony about the petitioner's activities during the alleged rape. The state appellate courts and the lower federal courts correctly concluded that the decisions of this Court did not require that the petitioner's conviction be set aside.

This Court has held that the Sixth Amendment requires that the assistance of counsel for a criminal defendant must not be hampered by counsel's simultaneous representation of conflicting interests. *Holloway v. Arkansas,* 435 U.S. 475 (1978); *Glasser v. United States,* 315 U.S. 60 (1942). This Court, however, has recognized that joint representation does not necessarily deny a criminal defendant his right to counsel, and that joint representation may, in certain cases, benefit each of the co-defendants. *Holloway v. Arkansas, supra,* 435 U.S. at 482-83. The Court has recently laid down the rule that, in order to establish a violation of the Sixth and Fourteenth Amendments, a habeas corpus petitioner, who had joint representation

in state criminal proceedings but raised no objection to such representation at trial, has the burden of demonstrating that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

The Ninth Circuit Court of Appeals correctly analyzed the petitioner's Sixth Amendment claim in light of this Court's precedents. It did not, as petitioner contends, "put the cart before the horse." (Pet. 16). The Ninth Circuit determined that the petitioner had failed to demonstrate that joint representation in his case gave rise to a conflict of interest which was actual rather than speculative. The court found that counsel's initial choice of the strategy of a joint defense was not rooted in a conflict of interest. The court found no evidence that petitioner's counsel had chosen to present a joint defense because one defendant might gain significantly to the consequent detriment to the interest of the co-defendant petitioner. (Pet. App. 24). The federal appellate court then focused on the petitioner's allegation that an actual conflict of interest arose at trial when the petitioner's co-defendant departed from the account which he had given to counsel and gave testimony that could be found to be in conflict with petitioner's testimony.

The court appropriately found that under the circumstances of the petitioner's case, any "conflict"

which arose during trial did not adversely affect the attorney's ability to advance the defense selected by the petitioner and his co-defendants. The court pointed out that the central issue for the jury was whether to believe the prosecutrix's version of a forcible gang-rape or the co-defendant's version that the prosecutrix was a willing participant in any sexual activity which occurred or which was declined. The court noted that the petitioner and his co-defendants chose to jointly present a coordinated defense designed to exculpate them all. *Myhrvold v. Sullivan,* No. 80-3445, slip op. at 3 (9th Cir. May 1981).(Pet. App. 25). Co-defendant Bethell did not testify that petitioner had engaged in forcible sexual activity with the prosecutrix. He only suggested that petitioner might have engaged in some sexual activity with a consenting prosecutrix; and, in any event, he indicated that he was just "estimating" about that. Given the fact that petitioner admitted looking into the cab of the pickup for approximately one minute and the fact that both his and Bethell's versions were completely at odds with the prosecutrix' account, the most reasonable conclusions to be drawn were those by the Ninth Circuit Court and federal district courts:

> "... the petitioner's interests were best served by stressing the consistencies of the two defendant's testimony and urging upon the jury the truth-

> fulness of petitioner's testimony where the two versions [of the codefendants] differed. The conflicting testimony may have damaged the likelihood that the joint defense would have succeeded, but did not adversely affect a single joint defense attorney's ability to advance it any more than it would have adversely affected the ability of separate defense attorneys to advance the same defense." *Id.*

The Court of Appeals for the Ninth Circuit committed no error in this matter. The petitioner's final point, that the Sixth and Fourteenth Amendments required the state trial court to ask the petitioner about his joint representation, *sua sponte,* has been decided contrary to the petitioner's contention in *Cuyler v. Sullivan, supra,* 446 U.S. at 347.

CONCLUSION

The petitioner seeks review of an issue that was correctly resolved below. The issue presented is not one of major significance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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